UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

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ALVIN BALDUS, CARLENE BECHEN, ELVIRA BUMPUS, RONALD BIENDSEI, LESLIE W. DAVIS, III, BRETT ECKSTEIN, GEORGIA ROGERS, RICHARD KRESBACH, ROCHELLE MOORE, AMY RISSEEUW, JUDY ROBSON, JEANNE SANCHEZ-BELL, CECELIA SCHLIEPP, TRAVIS THYSSEN and CINDY BARBERA,

Plaintiffs,

TAMMY BALDWIN, GWENDOLYNNE MOORE, and RONALD KIND,

Intervenor-Plaintiffs,

v.

Members of the Wisconsin Government Accountability Board, each only in his official capacity: MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,

Defendants,

F. JAMES SENSENBRENNER, JR., THOMAS E. PETRI, PAUL D. RYAN, JR., REID J. RIBBLE, and SEAN P. DUFFY,

Intervenor-Defendants

Case No. 11-C-562
JPS-DPW-RMD

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VOCES DE LA FRONTERA, INC., RAMIRO VARA, OLGA VARA, JOSE PEREZ, and ERICA RAMIREZ,

Plaintiffs,

v.

Members of the Wisconsin Government Accountability Board, each only in his official capacity: MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,

Defendants.

Case No. 11-CV-1011
JPS-DPW-RMD

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**Defendants' Brief in Response to the *Baldus* Plaintiffs' Trial Brief**

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## INTRODUCTION

"Redistricting is 'primarily the duty and responsibility of the State.'" *Perry v. Perez*, 565 U.S. ___, 2012 WL 162610, at *2 (Jan. 20, 2012) (quoting *Chapman v. Meier,* 420 U.S. 1, 27 (1975)). "That the federal courts sometimes are required to order legislative redistricting…does not shift the primary locus of responsibility." *LULAC v. Perry*, 548 U. S. 399, 415 (2006) (plurality). Both the U.S. Constitution and the Wisconsin Constitution vest in the state legislature responsibility for legislative and congressional redistricting. U.S. Constitution, Art. I, § 4; Wis. Const., Art. IV, § 3. Unless and until a court finds a constitutional or statutory violation, it has no constitutionally appropriate role in the redistricting process. *Perry*, 565 U.S. ___, 2012 WL 162610, at *5 ("[i]n the absence of any legal flaw in this respect in the State's plan, the District Court had no basis to modify that plan"). It is not the job of a court reviewing a legislative plan to decide whether it was the best possible plan. *Prosser v. Elections Bd.*, 793 F.Supp. 859, 865 (W.D. Wis. 1992); *Arizona Minority Coalition for Fair Redistricting v. The Arizona Independent Redistricting Commission*, 121 P.3d 843, 850 (Ct. App. Az. 2005) (collecting cases). Because the *only* questions properly before this Court are whether Acts 43 and 44 violate the Voting Rights Act or are unconstitutional, defendants address those, and only those issues.[1]

[1] Plaintiffs' trial brief reveals their intention to convert this trial into a general referendum on how the legislature's map stacks up against a map the Court might have drawn had it been up to the Court to do so. On page two of their brief, plaintiffs note that although there is no shortage of relevant precedent, they are opting to premise their case and arguments in support of their claims primarily on the "four published [one isn't and another was vacated] decisions by the successive three-federal judge panels convened here since 1982" because "those panels involved six federal judges who lived most of their lives in this state." *Plts' Tr. Br.*, dkt. # 165, at 2. The far more likely reason for plaintiffs' decision to ignore most all other relevant case law in favor of these cases is that the three non-vacated cases--*Baumgart v. Wendelberger*, 2002 WL 34127471 (E.D. Wis. 2002 May 30, 2002), *amended by* 2002 WL 34127473 (E.D. Wis. July 11, 2002); *Prosser v. Elections Bd*., 793 F.Supp. 859 (W.D. Wis. 1992); and *Wisconsin State AFL-CIO v. Elections Bd.*, 543 F.Supp. 630, 631 (E.D. Wis.1982)--each involved situations in which the court was forced to draw districts because the legislature had failed to do so. The standards federal courts apply when drawing districts where a state has failed to do so are not the standards that apply when it is evaluating the legality of a legislature's plan. *E.g.*, *Abrams v. Johnson*, 521 U.S. 74, 98 (1997); *Baumgart*, 2002 WL 34127471 at * 3; *Prosser*, 793 F.Supp. at 865 ("[o]ur task would be easier if we were reviewing an enacted districting plan rather

## ARGUMENT

### I. Neither Act 43 Nor Act 44 Violates the U.S. Constitution.

#### A. Population Equality of Federal Congressional Districts

The *Baldus* plaintiffs assert that the federal congressional districts created by Act 44 are not compact and fail to preserve communities of interest. Under the U.S. Constitution, "compactness, contiguity, and respect for political subdivisions … are important not because they are constitutionally required—*they are not*—but because they are objective factors that may serve to defeat a claim [of unconstitutional redistricting]." *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (citing *Gaffney v. Cummings,* 412 U.S. 735, 752, n. 18 (1973) (emphasis supplied)). These objective principles are simply legitimate goals that can be used to justify variances from perfect population equality. *Id*. A party challenging congressional apportionment must demonstrate the existence of a population disparity that could have been reduced or eliminated altogether before these principles will come into play. *Karcher v. Daggett*, 462 U.S. 725, 730 (1983). Upon such a showing, the burden shifts to the state to prove "that each significant variance between districts was necessary to achieve some legitimate goal" such as "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives." *Id*. at 731, 740.

Because preserving compactness, contiguity, communities of interest and/or local government subdivisions are not federal constitutional mandates, *Shaw*, 509 U.S. at 647; *Gaffney,* 412 U.S. at 752, n. 18, there is no such thing as a viable, free-standing claim for lack of compactness, lack of contiguity or failure to maintain communities of interest or core populations under the U.S. Constitution. *See*, *e.g.*, *Gorrell v. O'Malley*, 2012 WL 226919 (D.

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than being asked to promulgate one ourselves"). Whether the map drawn by the legislature differs from the one the court might have drawn is of no legal consequence. *Id*.

Md. Jan. 19, 2012).[2] As noted in the parties' joint statement of stipulated facts, "Act 44 apportions the census population of the State of Wisconsin perfectly into eight districts with a variance of one person." *Joint Final Pretrial Report*, dkt. # 158, at ¶ 191. This ends the inquiry. Because there is perfect population equality, Equal Protection is satisfied. *Shaw*, 509 U.S. at 647; *Karcher*, 462 U.S. at 730. Plaintiffs should not be indulged in their desire to litigate whether there would have been a justification for population variances where there is no variance to justify.

**B. Population Equality of State Senate and Assembly Districts**

"[S]tate reapportionment statutes are not subject to the same strict standards applicable to reapportionment of congressional seats." *White v. Regester*, 412 U.S. 755, 763 (1973). Unlike reapportionment of federal congressional districts, where nearly any deviation from perfect population equality must be justified, population deviation between state legislative districts must be shown to rise to a certain threshold before it is appropriate for a federal court to demand justification. *Id*.; *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973). "[M]inor deviations from mathematical equality among state legislative districts are insufficient to make out a *prima facie* case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State." *Gaffney*, 412 U.S. at 745.

In subsequent cases, the U.S. Supreme Court has clarified what kind of population deviations might qualify as substantial enough to warrant judicial intervention. In *Gaffney*, the Court held that the district court had erred in injecting itself where the state plan created House districts with a maximum population variance of 7.83% and Senate Districts with a maximum

[2] Although the Wisconsin Constitution does impose contiguity and compactness requirements applicable to state assembly and senate districts, *see* Wis. Const., Art. 4, §§ 4 and 5, it provides no standards for *federal* congressional districts. Even if it did, any claim that Act 44 violated the Wisconsin Constitution would be barred under *Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 117 (1984).

population variance of 1.81%. 412 U.S. at 750 ("[t]he point is, that such involvement should never begin"). Later that same term, the Court held that a deviation rate of 9.9% was not significant enough to make out a prima facie Equal Protection case. *White*, 412 U.S. at 764 ("we cannot glean an equal protection violation from the single fact that two legislative districts in Texas differ from one another by as much as 9.9%"). In 1983, the U.S. Supreme Court noted "[o]ur decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations." *Brown v. Thompson*, 462 U.S. 835, 842 (1983).

The total population deviation for state senate and assembly districts created by Act 43 is less than one tenth of what would be necessary just to trigger judicial scrutiny. The parties have stipulated that the maximum deviation for assembly districts is 0.76%, while the maximum deviation rate for senate districts is 0.62%. *Joint Pretrial Rpt*., dkt # 158, at ¶ 154. Again, the *Baldus* plaintiffs skip over their burden to make out a *prima facie* case and jump straight into litigating what justifications would have been available had there been population deviations significant enough to trigger judicial scrutiny. This is improper. *See generally Gaffney*, 412 U.S. at 750; *Frank v. Forest County*, 194 F.Supp.2d 867, 874 (E.D. Wis. 2002) (burden to justify variance does not shift to defendant until plaintiff makes showing of a greater than 10% population deviation).

**C. Political Gerrymandering**

As explained in greater detail in defendants' brief in support of their motion for summary judgment (dkt. # 129), in order to prevail on a political gerrymandering claim, plaintiffs bear the burden of doing what neither the U.S. Supreme Court, nor any other lower federal court or plaintiff has been able to do in over a quarter century of trying: identify a workable standard for determining when political gerrymandering is so extreme that it infringes upon plaintiffs'

constitutional rights. Any proposed standard cannot simply test for political influence—politics always influences redistricting and there is nothing unusual or wrong in this, constitutionally or otherwise. *Vieth v. Jubelirer*, 541 U.S. 267, 286 (2004) (plurality) ("partisan districting is a lawful and common practice").

A summary of the lengthy and complicated judicial history of the political gerrymandering claim is set forth in defendants' brief in support of their motion for summary judgment, dkt. # 129, at pp. 6-14. The U.S. District Court for the Northern District of Illinois recently summarized the current state of the law on political gerrymandering as follows:

> [T]he point that we draw from these cases is that political gerrymandering claims remain justiciable in principle but are currently "unsolvable" based on the absence of any workable standard for addressing them. The crucial theoretical problem is that partisanship will *always* play *some* role in the redistricting process. As a matter of fact, the use of partisan considerations is inevitable; as a matter of law, the practice is constitutionally acceptable. The relevant question is not whether a partisan gerrymander has occurred, but whether it is so excessive or burdensome as to rise to the level of an actionable equal-protection violation. How much is too much, and why?

*Radogno v. Illinois State Bd. of Elections*, 2011 WL 5868225, *2 (N.D. Ill. 2011) (emphasis in original; citations omitted).

In responding to Intervenor-Defendants' Motion for Judgment on the Pleadings, plaintiffs have proposed a "least change" standard for evaluating political gerrymandering claims. *Plts.' Br. In Opp. To Mot. For Judg. On Pleadings*, dkt. # 105, at 3-4. The various reasons why this proposed test fails on nearly every level have been set forth in two separate pleadings. *See generally Intervenor-Defs' Reply Br. In Supp. Of Mot. For Judg. On Pleadings*, dkt. # 115, at 6-16; *Defs.' Br. In Supp. Mot. For Summ Judg.*, dkt # 129, at 14-20. Because the *Baldus* plaintiffs make no mention of this standard and almost no mention of their political gerrymandering claim in their trial brief, defendants will not reiterate here why that standard fails. However, the Intervenor-Defendants have addressed the political gerrymandering arguments raised in

Intervenor-Plaintiff's trial brief and Defendants join that response (dkt. # 168).

## II. *Pennhurst* Bars This Court from Reviewing Whether Act 43 or Act 44 Violates the Wisconsin Constitution.

Although the Wisconsin Constitution imposes certain contiguity, local political boundry and compactness requirements for state legislative districts (though it says nothing about *congressional* districts), *see* Wisconsin Const., Art. IV, §§ 4 or 5, "a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when-as here-the relief sought…has an impact directly on the State itself." *Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 117 (1984).[3] Because "[i]t is difficult to think of a greater intrusion on state sovereignty," *id*. at 106, federal courts "do not have authority to enjoin state officials from violating state law." *Froehlich v. Wis. Dep't of Corrections*, 196 F.3d 800, 802 (7th Cir. 1999).

The *Baldus* plaintiffs attempt to get around this bar by arguing that defendants waived their sovereign immunity because this issue was not raised earlier in litigation. *Plts' Tr. Br.*, dkt. # 165, at 4, n. 4. In fact, *Pennhurst* was raised in multiple prior submissions. *See* dkt. # 60, at p. 8, 14; dkt. # 76 at 3; dkt. # 116 at 7; *see also* dkt. # 66, at aff. Def. ¶ 12 (incorporating by reference all affirmative defenses alleged by intervenor-defendants which included sovereign immunity). Moreover, because "'federal jurisdiction over suits against unconsenting States was not contemplated by the Constitution when establishing the judicial power of the United States,'" *Sossamon v. Texas*, 563 U.S. ___, 131 S.Ct. 1651, 1657-58 (Apr. 20, 2011) (citation omitted), "[the] 'test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one.'" *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd*., 527 U.S. 666, 675-76 (1999) (citations omitted).

[3] A State's sovereign immunity extends to its agencies, *id.* at 100; *see, e.g.*, *Hirsh v. Justices of the Supreme Court of the State of Cal.,* 67 F.3d 708, 715 (9th Cir. 1995), and to "a suit against a state official in his or her official capacity" because such a suit "is no different than a suit against the State itself." *Will v. Mich. Dep't of State Police,* 491 U.S. 58, 71 (1989).

Federal courts should find waiver "only where stated 'by the most express language or by such overwhelming implications . . . as (will) leave no room for any other reasonable construction.'" *Edelman v. Jordan*, 415 U.S. 651, 673-74 (1974) (citations omitted). The *Baldus* plaintiffs argue that sovereign immunity has been waived, by implication, through litigation conduct. "The hallmark of whether a State has waived its Eleventh Amendment immunity in the context of litigation is the State's voluntary invocation of federal jurisdiction." *Pennsylvania, Dept. of Environmental Protection v. Lockheed Martin Corp*., 731 F.Supp.2d 411, 415 (M.D. Pa. 2010); *see also College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd*., 527 U.S. 666, 676-77 (1999). This, defendants have not done here.[4]

**III. Plaintiffs Cannot Prevail on Their Delayed Voting Claim.**

The third count in the *Baldus* plaintiffs' Second Amended Complaint alleges that Act 43 "disenfranchises" 299,533 citizens by moving them from an even to an odd numbered state senate district, thereby resulting in a two-year delay before they are eligible to vote in a state senate election again. Plaintiffs allege that this delayed eligibility violates the provision of the Wisconsin Constitution that calls for state senate elections to be held every four years. *Sec. Am. Compl*, dkt. # 58, ¶ 45.[5] First, as noted above, because the claim is premised on the Wisconsin Constitution, it is barred under *Pennhurst*.

[4] The notion that Defendants could have waived sovereign immunity by not filing a motion for immediate dismissal in this case is completely incongruous with Supreme Court precedent. *See, e.g.*, *Lapides*, 535 U.S. at 623-24 (noting that because the rule that a state is deemed to have waived its jurisdiction when it deliberately and voluntarily invokes the federal court's jurisdiction is clear and easily applied, states will not "have to guess what conduct might be deemed a waiver in order to avoid accidental waivers"). Given the extremely condensed litigation schedule in this case and that the facts relevant to the federal claims overlap substantially with the facts relevant to the state law claims, there are clearly strategic reasons for not filing a motion to dismiss after plaintiffs filed their Second Amended Complaint that have absolutely nothing to do with an intent to waive sovereign immunity. As such, the decision not to file such a motion cannot possibly be regarded as reflecting an "overwhelming implication" of intent to waive.

[5] The text of the Wisconsin constitution provision alluded to provides "senators shall be chosen alternately from the odd and even numbered districts for the term of 4 years." Wis. Const., Art. III, § 5. Nothing in Act 43 purports to change this rule--state senators will continue to be chosen alternately from the odd and even numbered districts for the term of 4 years.

Second, the Wisconsin Supreme Court, the ultimate arbiter of the meaning of the Wisconsin Constitution, has held that the mere fact that redistricting results in some voters having to wait six years to vote in a state senate election, while some others will get to vote with only a two year gap, does not give rise to a violation of the Wisconsin Constitution:

> [Fact that "large numbers" of voters will have to wait six years between state senate elections] is alleged as a reason why the act is invalid. The court finds in the constitution no authority conferred upon it to interfere with the numbering of the senate districts. In that respect the power of the legislature is absolute.

*State ex rel. Attorney General v. Cunningham*, 81 Wis. 440, 468, 51 N.W. 724 (1892).[6]

Plaintiffs rely on *Republican Party of Wisconsin v. Elections Board*, 585 F.Supp. 603 (E.D. Wis. 1984), but the U.S. Supreme Court vacated that opinion, 469 U.S. 1081 (1984), leaving it with no precedential value. *Cf. O'Connor v. Donaldson*, 422 U.S. 563, 577, n. 2 (1975) (vacated order is of no precedential value). Even had it not been, it offers little support for plaintiffs' claim. After the 1980 census, and in response to the state's failure to pass a redistricting plan, a three-judge panel developed a redistricting plan under which 713,225 Wisconsin residents would need to wait six years between senate elections. *AFL-CIO v. Elections Board*, 543 F.Supp. 630 (E.D. Wis. 1982). A group of intervenors challenged the plan on that basis and in rejecting the argument, the court noted that although it "may have some emotional appeal," it is "a house of cards that collapses when exposed to even the gentle breeze of cursory analysis" and contrary to both Wisconsin law and "common sense." *Id*. at 659.

In 1983, the Wisconsin Legislature then enacted a new districting plan creating an *additional* group of 173,976 who would be ineligible to vote for a state senate for six years and

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[6] "At one time, Assembly districts which divided counties were held unconstitutional in Wisconsin except where a county was entitled to more than one state Representative." *Wisconsin State AFL-CIO v. Elections Bd*., 543 F.Supp. 630,635 (E.D. Wis. 1982) (citing *State ex rel. Attorney General v. Cunningham*, 81 Wis. 440, 468, 51 N.W. 724 (1892)). Given the unacceptable population deviations that can be caused by the Wisconsin constitutional provisions relating to county lines, those constitutional provisions have been viewed as "nugatory." *Id*. (citing 58 Op. Atty. Gen. 88 (1969)).

in reviewing that legislation, a different three judge panel found the *additional* delays to be impermissible, noting that "had the Legislature enacted a reapportionment plan similar to its '83 effort before the November 1982 elections, we would have no trouble sustaining its validity against a constitutional challenge." *Republican Party,* 585 F.Supp at 605-06. In other words, it was not the number, but the timing. Thus, even had it not been vacated, that opinion would provide no support for the *Baldus* plaintiffs' claims.

## IV. Act 43 Does Not Violate the Voting Rights Act

### A. African American Districts

The Supreme Court has established three "necessary preconditions" a minority group must show to make out a claim under Section 2 of the Voting Rights Act, the first one of which is proof that the group is "sufficiently large and geographically compact to constitute a majority in a single-member district." *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). In support of their VRA claim, as it relates to the African-American community, the *Baldus* plaintiffs alleged that African Americans comprise a sufficiently large and geographically compact group to constitute a majority of the voting age population in seven assembly districts, but Act 43 creates only six. *Sec. Am. Compl*, dkt. # 58, ¶ 76(b).

As noted with greater detail in defendants' motion for summary judgment, all of the parties are now in agreement that the African American population in Wisconsin is not large enough to create a seventh majority-minority Assembly district and therefore, the first *Gingles* precondition cannot possible be met. Whether or not a seventh "influence district" could be created is irrelevant; this does not create a claim under the Voting Rights Act. *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009) (plurality). For reasons that remain unclear to defendants, the *Baldus* plaintiffs continue to pursue it as though it were not dead on arrival.

### B. Latino Districts

The *Baldus* plaintiffs' allegations that Act 43 violates the Voting Rights Act with respect to the Latino community is redundant with the claim asserted by the *Voces* plaintiffs. Defendants address that claim in their response to the *Voces* plaintiffs' trial brief filed contemporaneously herewith. To the extent necessary, defendants expressly incorporate by reference their response in that brief as though fully set forth herein.

## V. This Court Lacks Jurisdiction Over Plaintiffs' Claim Seeking a Declaration that Neither Act 43 or Act 44 Apply to Special or Recall Elections.

Finally, the *Baldus* plaintiffs insist that they are entitled to a declaration that the districts created by Act 43, if upheld, will not apply to any recall or other special elections taking place prior to the regular election scheduled for November 2012. The first problem with this argument is that the question whether the new districts apply to recall elections involves the construction of the statutory language of Act 43 and thus, presents a question of state law barred under *Pennhurst*. *See Benning v. Bd. of Regents of Regency Universities*, 928 F.2d 775, 778 (7th Cir. 1991) (*Pennhurst* bars claims for declaratory relief). A group of Republican-aligned voters have initiated an action in state court seeking a declaration that the new districts should apply to recall elections, and this suit was triggered by a memorandum issued by the GAB concluding the opposite. *Clinard v. Brennan*, Waukesha Co. Case No. 11-cv-3995. This raises the second problem: defendants agree that Act 43's districts should not be applied until November 2012. Accordingly, there is no controversy here; the controversy is in the state court action. The jurisdiction of federal courts to issue declaratory judgments is bounded by the requirement that there be a "substantial controversy, between parties having adverse legal interests." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007). Such a controversy does not exist here.

Dated this 20th day of February, 2012.

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